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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 691

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

EDYTHE STERLING HAMMOND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION AS TO THE RECORD.

Filed February 1, 1943.

WILBER STAMMLER,
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DANIEL G. ALBERT,
GEORGE W. DALZELL,
Of Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ogden H. Hammond, Jr., respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This case involves important questions of the status of the inferior courts of the District of Columbia and of the proper application of the law of New York by the District of Columbia courts in a separation agreement case. The

material facts herein are undisputed, and only questions of law arise on the record.

Petitioner and respondent, living in New York, were there married on June 7, 1933 (R. 88). The sole marital domicile was New York, and the only issue of the marriage was a daughter there born on March 22, 1936 (R. 88). Disagreements arose and a separation took place at the end of 1937 (R. 88). A separation agreement was entered into in New York as of January 1, 1938 (R. 88), and this separation agreement is set forth in full as the contract upon which this suit was instituted (R. 64-75). Respondent and petitioner were divorced at Reno, Nevada, on March 3, 1938 (R. 89), and the decree of divorce by reference incorporated the separation agreement (R. 76-77).

The separation agreement here in suit provides that for the year 1938 petitioner was to turn over to respondent the leased apartment in which they had lived at 950 Park Avenue, New York City, and 20% "of all income received by him during such period", and for the years thereafter to pay respondent 40% of petitioner's income if it did not exceed $7,500 (R. 66-67). When petitioner's income was more than $7,500, respondent was to receive 30% "but in no event less than Three Thousand Dollars ($3,000) nor more than Six Thousand Dollars ($6,000)" (R. 67).

The separation agreement also provided that respondent should have custody of the child during minority subject to complete right of visitation by petitioner, and also subject to petitioner's right "at his option (1) to have complete custody of the Child for two (2) months in each year at any time designated by him so long as the Wife has not remarried and the Child has not attained the age of eight (8) years * * *", the state of affairs prevailing now (R. 65). After the child has attained the age of eight years (March 22, 1944), petitioner and respondent are to share the custody of the child equally each

year (R. 65-66). Respondent was also to turn over to petitioner certain very valuable antique furniture listed in Schedule A to the separation agreement (R. 69-70, 72-75).

In May, 1941, the respondent instituted this action in the then Municipal Court of the District of Columbia to recover an alleged balance of $210.99 for the year 1939, and of $600 for the year 1940 under the separation agreement. There is some dispute about one item of $100 for the year 1940 (R. 63, 114, 121-122), but the figures are otherwise undisputed on all sides. Petitioner by way of defense set up that he had overpaid respondent the amount of $722.01 for the year 1938, which on accounting, together with the above item of $100, and certain other items (R. 99-100) later set out, amounted to an overpayment for the three years in question (1938, 1939, 1940).[1] Petitioner set up as a further defense that in no event was respondent entitled to recover because she had refused him the custody of the child and thus had breached the terms of the agreement under the governing

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[1] The balance of payments under the separation agreement for the three years 1938, 1939 and 1940 here in dispute stand admittedly as follows:

Calendar Year.	Due Plaintiff.	Paid to or on Account of Plaintiff.
1938	$1,677.99	$2,400.00
1939	2,610.99	2,400.00
1940	3,000.00	2,500.00
Overpayment to Plaintiff	11.02	
	$7,300.00	$7,300.00

Nevertheless, the judgment affirmed below admittedly gives respondent *a double recovery* in the amount of $810.99. Based on this double recovery, respondent has already instituted certain other litigation (*Hammond* v. *Hammond*, No. 13623) in the District Court of the United States for the District of Columbia against petitioner in an attempt to deprive him of all custody of his child and at the same time compel him to pay her a life annuity of $3,000 to $6,000 a year despite her refusal to fulfill her covenants. Petitioner enlisted in the Army on December 15, 1942, and the District Court litigation by court order was stayed for the duration of his military service on December 17, 1942.

law of New York, and also she had failed and refused to turn over the furniture to him. See R. 135-136.

At the trial before Judge Robert E. Mattingly in the Municipal Court without a jury on July 17, 1941, respondent proved only the agreement, the divorce and the payments made, *nothing else* (R. 20-29). The court then *assumed* that petitioner had violated the separation agreement by refusing to make certain sworn statements as to his income on the 10th of January each year (R. 31, 51-53). The court then went on to shift the burden of proof to petitioner, holding that it was his duty as defendant to show that he had committed no defaults under the separation agreement *before he could introduce any proof* (R. 54, 62, 52-53). *There is not a single word of proof to the effect that petitioner ever violated the agreement in the entire record, and it is not the fact.* On this *assumption,* the Municipal Court excluded all of petitioner's proof save only the oral conversations in which respondent had refused petitioner the custody of the child in 1941 *before this suit was instituted. This denial of custody to petitioner is undisputed* (R. 37, 39). The court excluded, however, documentary evidence in the form of letters between petitioner and respondent showing denial of custody (R. 82-88, 101-103, Excluded R. 46). Automatic exceptions were preserved to every adverse ruling of the Municipal Court (R. 43, 54).

Throughout the trial petitioner pressed upon the court offers of expert testimony on the law of New York which admittedly alone controlled this case, and these were always rejected by the trial court (R. 32, 47-48, 54). The theory on which these were rejected was that the Municipal Court of the District of Columbia was a "court of the United States" and as such entitled to take judicial notice of all laws prevailing in another State, and consequently that under the rule announced by this Court in *Fourth National Bank v. Franklin,* 120 U. S. 747, and the cases following

that decision, the admission of expert testimony on the law of New York was forbidden. To all of these rulings petitioner duly excepted (R. 32, 47-48, 54).

After having the case under advisement for some months, the Municipal Court, in September, 1941 without opinion handed down a general trial finding in respondent's favor but "without interest or costs" (R. 93). Certain special special findings submitted by petitioner were made (R. 88-89, 90), although most were refused, even though such refusal was contrary to the undisputed evidence in many instances (R. 88-93). A detailed motion for new trial was filed by petitioner (R. 94-106), and summarily denied (R. 93). In this motion for new trial petitioner set out that he had been denied a fair trial by reason of the exclusion of all his proof (R. 106). Final judgment was then entered for respondent in the amount of $810.99, without interest or costs (R. 107).

Petitioner was allowed an appeal by the United States Court of Appeals for the District of Columbia on February 3, 1942, by an order signed by Mr. Justice Stephens for a bench in the Court of Appeals differently constituted in membership than that which eventually heard the appeal (R. 18). The appeal was argued on October 14, 1942, in the Court of Appeals and on November 9, 1942, that court handed down its *per curiam* opinion (R. 113-115; 131 F. (2d) 351), affirming the judgment of the Municipal Court. Passing by all other questions without discussion, the Court of Appeals rested its affirmance on two grounds: First, that the 1938 overpayment could not be considered as an equitable set-off because it was a voluntary overpayment, made under a mistake of law; and, secondly, that petitioner could not set up respondent's refusal of custody as a defense despite the law of New York because he was in prior default under the agreement (a result reached only as a consequence of the court's decision upon the first ground).

Petitioner filed a full petition for rehearing[2] (R. 117-136) in the Court of Appeals, calling the attention of that Court in detail to the various errors of New York law and omissions contained in the opinion of the Court, and especially emphasizing his contention that the Municipal Court was not a "court of the United States" (R. 126-131). This was denied without opinion by the Court of Appeals on December 2, 1942 (R. 138).

II.

Jurisdiction.

Petitioner's timely-filed petition for rehearing was denied by the Court of Appeals on December 2, 1942 (R. 138). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Questions Presented.

On the facts of this case, the following questions are presented:

(1) Is the Municipal Court of the District of Columbia a "court of the United States", so that under the applicable decisions of this Court the said Municipal Court knows *sua sponte* by judicial notice all the laws of all the States of the United States, and is consequently forbidden to take expert testimony as to the law of any State?

(2) Was the law of New York, admittedly the sole determinant of the rights of the parties in this case, properly applied by the courts below?

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[2] Record references in the rehearing petition are denoted as "App. p.—," but the page references are identical with those of the record here.

(3) Should petitioner's 1938 overpayment be set off against respondent's later claim for a double recovery?

(4) Does respondent's denial of custody to petitioner bar her recovery?

(5) On this record, should judgment for respondent (plaintiff below) herein be reversed?

IV.

Statutes Involved.

On the merits this case depends upon the common law of New York involving no statutes. On the important question of the status of the inferior courts of the District of Columbia, however, the following portions of the Code of 1940 of the District of Columbia are pertinent:

> "Section 11-101. The judicial power in the District shall be vested in—
>
> "First. Inferior courts, namely, municipal court, juvenile court of the District of Columbia, and the police court; and
>
> "Second. Superior courts, namely, the District Court of the United States for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States. (Mar. 3, 1901, 31 Stat. 1190, ch. 854, sec. 2; Mar. 19, 1906, 36 Stat. 73, ch. 960; Feb. 17, 1909, 35 Stat. 623, ch. 134; June 7, 1934, 48 Stat. 926, ch. 426; June 25, 1936, 49 Stat. 1921, ch. 804.)"
>
> "Section 11-305. The said court [that is, the District Court of the United States for the District of Columbia] shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a court of the United States.[3]

[3] No similar provision appears anywhere as to the Municipal Court or other inferior courts of the District of Columbia.

V.

Reasons for Granting the Writ.

1. The question of the status of the inferior courts of the District of Columbia is a generally important one and also involves certain statutory and constitutional questions which have not yet been, but should be, settled by this Court. The decision of this Court in *O'Donoghue* v. *United States*, 289 U. S. 516, determined that the superior courts (now the District Court of the United States for the District of Columbia and the United States Court of Appeals for the District of Columbia) were constitutional courts of the United States, but no precise decision defining the status of the inferior courts of the District of Columbia has been handed down by this Court, although it is believed that the pertinent decisions hereinafter referred to (*infra*, pp. 18-22) clearly point the way to a decision that the inferior courts of the District of Columbia are neither constitutional courts nor "courts of the United States" in any generally accepted sense. The increasing number of people in the District of Columbia, and the great volume of litigation in the Municipal Court making necessary an increase in the number of judges therein and a rearrangement of their functions by Congress (see Act of April 1, 1942), make it important to have a final decision on these points by this Court.

2. The United States Court of Appeals for the District of Columbia in its decision herein has not given proper effect to the applicable decisions of this Court which command that the law of New York should solely govern a determination of this case upon the merits, but, while paying lip-service to the law of New York, the Court of Appeals have in fact and substance completely circumvented that law by applying its own general philosophy of law. This

might be proper in a case governed in all respects by the law of the District of Columbia, but is erroneous in a case governed by the law of New York. All of this has been to the detriment of your petitioner. Among others, the applicable decisions which have not been given proper effect by the Court of Appeals in taking the above-stated action are: *Atherton* v. *Atherton*, 181 U. S. 155; *Williams* v. *North Carolina*, — U. S.—, decided by this Court December 21, 1942; *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Moore* v. *Illinois Central Ry. Co.*, 311 U. S. 643. Also the Court of Appeals denied effect to the applicable decision of this Court in *Walker* v. *Walker*, 9 Wall. (U. S.) 743, establishing the proper accounting procedure to be followed under a separation agreement.

3. The United States Court of Appeals for the District of Columbia, in affirming on this record the judgment against petitioner in the Municipal Court, in effect deprived petitioner of his property without due process of law, and so far sanctioned a departure from the accepted and usual course of judicial proceedings by the Municipal Court of the District of Columbia as to call for the exercise of this Court's power of supervision. If the Court of Appeals involved were one of the ten Circuit Courts of Appeal of the United States, this would unquestionably be reason for this Court's review and supervision, under Rule 38, Par. 5(b) of the Rules of this Court, and it is submitted by virtue of provisions of Section 11-101 of the Code of 1940 of the District of Columbia that this Court's power of supervision as the court of final resort in the District of Columbia should here likewise be invoked. Petitioner submits that on all the facts of this case he was denied a fair trial by the Municipal Court, and respectfully requests this Court to review the record herein to determine that question. See petition for rehearing (R. 117-136).

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings had in said United States Court of Appeals for the District of Columbia in the case therein entitled "Ogden H. Hammond, Jr., Appellant, *v.* Edythe Sterling Hammond, Appellee, No. 8050", to the end that said case may be reviewed and determined by this Court, as provided by law, that the judgment of said court be reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem just and proper.

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